

Supreme Court, U. S.

FILED

OCT 27 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1977
No. **77-617**

TERMINAL-HUDSON ELECTRONICS, INC.,
OF CALIFORNIA, dba OPTI-CAL,

Appellant,

vs.

DUNDAS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL, FOURTH APPELLATE DIS-
TRICT, STATE OF CALIFORNIA

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JURISDICTIONAL STATEMENT

Appellant submits herewith his juris-
dictional statement as required by Rule
15 of the Rules of the Supreme Court of
the United States.

OPINION BELOW

The Opinion of the Court of Appeal,
Fourth Appellate District, Second Division,

State of California has not been reported. The Decision of the Supreme Court of the State of California Denying Hearing has not been reported.

GROUND OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) since the case involves the question of whether a statute of the State of California, both on its face and as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment and the Fifth Amendment to the Constitution of the United States. The Opinion sought to be reviewed of the Court of Appeal, Fourth District, Second Division, State of California was dated and entered on June 24, 1977, and was not published but is attached hereto as Appendix "A". An order Denying Rehearing was dated July 12, 1977, and an Order Denying a Petition for Hearing by the Supreme Court of the State of California was filed on August 18, 1977.

A Notice of Appeal to the Supreme Court of the United States was filed on October 19, 1977 in the Court of Appeal, Fourth District, Second Division of the State of California.

28 U.S.C. § 1257(2) has been sustained to grant jurisdiction for the United States Supreme Court where the question of validity of a State statute on the ground that it is repugnant to the constitution in that "a civil litigant may seek review in the United States Supreme Court of any Federal claim properly asserted in and rejected by the State Courts." Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482.

The validity of Business and Professions Code § 2556 of the State of California which reads in pertinent part,

"...; to directly or indirectly, employ or maintain on or near the premises used for optical dispensing, a refractionist, an optometrist, a physician or surgeon,"

and violation of said section is made a criminal offense by Business and Professions Code § 2558.

QUESTIONS PRESENTED

Whether the use of the word "near" as an operative word in a criminal statute is so vague and ambiguous as to be repugnant to the due process clause of the United States Constitution , Article 14, Section 1, and the Fifth Amendment.

STATEMENT OF THE CASE

Thirty-four optometrists brought an action for injunction against the appellant and others to enjoin the appellant from employing an optometrist by an optician alleging that such acts were violative of Civil Code § 3369 of the state of California, in that such conduct was "unfair competition."

The Board of Medical Examiners intervened as Plaintiff alleging a violation of the Business and Professions Code § 2556 (a criminal statute under Business and Professions Code § 2558) in that the appellant employed or maintained near the premises used for optical dispensing an optometrist and Civil Code § 3369.

The Board of Optometry intervened as Plaintiff alleging violations of certain sections of the optrometry law and Civil Code § 3369.

The facts are that the appellant in some cases furnished the premises to the optometrists, in some cases at no charge, and paid the optometrists a subsidy in addition to the fees the optometrists collected from his patrons.

In every case the premises of the optometrist are separated from that of the optical dispensing firm by a solid wall (partition) to the ceiling and are entered by a separate doorway and entrance from the public street or public portion of a shopping center.

The federal question was raised by the appellant at the trial level in his answers to all of the appellant's complaints as an affirmative defense in that said code sections were violative of appellant's rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

The federal question was again raised by the appellant in his briefs to the

California Court of Appeal and to the California Supreme Court.

The trial court found that appellants had not employed an optometrist but had maintained an optometrist near the premises used for optical dispensing in violation of Business and Professions Code § 2556 and issued an injunction to prevent the appellant from further violations.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The federal question presented in this appeal is so basic that it is foundational to due process. As cited in the appellant's opening brief to the Court of Appeal for the State of California:

"The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

differ as to its application violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 70 L.Ed. 322, 46 S.Ct. 126 (1926), such question was ignored by the state courts in this action.

Jurisdiction is proper since the federal question presented by the appellant at the trial court and appellate courts were ignored by such courts and appellant hereby invokes the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257(2) (supra) and Huffman v. Pursue (supra).

CONCLUSION

Appellant submits that this appeal brings before the court a substantial federal question which requires plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,
CHARLES W. ANSHEN

Attorney for Appellant

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

Court of Appeal-Fourth Dist.

F I L E D

JUN 24 1977

Ervin J. Tuszycki, Clerk

M. Gather, Deputy Clerk

ROBERT O. DUNDAS, O.D., et al.,)

) 4 Civil

Plaintiffs and Respondents,) 15874

v.

) (Sup.Ct.

) 186603)

OPTICAL CORPORATION OF

CALIFORNIA, et al.,

Defendants and Appellants,

) OPINION

CALIFORNIA STATE BOARD OF

OPTOMETRY, and CALIFORNIA

STATE BOARD OF MEDICAL

EXAMINERS,

Plaintiffs in Intervention)

and Respondents.)

APPEAL from the Superior Court of Orange County.

Claude M. Owens and Robert L. Corfman,
Judges. Affirmed.

Charles W. Anshen for Defendants and
Appellants.

Wilke, Fleury, Goffelt & Gray by

A-1.

William A. Gould, Jr. for Plaintiffs and Respondents.

Evelle J. Younger, Attorney General, and Samuel E. Spital, Deputy Attorney General, for Plaintiffs in Intervention and Respondents.

Plaintiffs, a group of optometrists, brought this action for injunctive relief against defendant corporation, a chain dispensing optician. Respondents are the State Board of Optometry and California State Board of Medical Examiners (now renamed for no discernible reason The Board of Medical Quality Assurances).

The evidence disclosed, and the trial court found, that defendants established offices to sell glasses in shopping centers, then partitioned off a portion of the premises for optometrists' offices. Defendants completely furnished the offices of the optometrists with equipment and used strawmen to sublease the offices to the optometrists. Defendants exercised complete control of the optometrists. Defendants made appointments for them and advertised for them. The optometrists filed

daily reports with and had their working hours approved by the defendants. Sometimes defendants' employees answered the telephone for the optometrists and on one occasion defendants cancelled an optometrist's lease when he took an unauthorized vacation. Defendants charged nominal or no rental for these fully-equipped optometrists' offices and further provided the optometrists with a guarantee of up to \$30,000 per year to be offset by eye examination fees collected by the optometrists. Not surprisingly, the trial court found that defendants' activities violated Business & Professions Code § 2556 and Civil Code § 3369 and enjoined defendants from doing so. In substance, the trial court enjoined the defendants from (1) employing or maintaining an optometrist in or near the premises used for optical dispensing in violation of § 2556 of the Business & Professions Code; and (2) engaging in unfair competition within the meaning of Civil Code § 3369(3) by performing any or all of the above acts.

On appeal, defendants contend:

(1) That Civil Code § 3369 is not

applicable to this situation and as a result plaintiffs have no standing to seek injunctive relief.

Civil Code § 3369 defines unfair competition as "unlawful, unfair. . .business practices." Defendants attempt to avoid the impact of section 3369 by reliance on International Etc., Workers v. Landowitz, 20 Cal.2d 418. Unfortunately for defendants, Landowitz was decided before the 1969 amendment to Civil Code § 3369 which added the word "unlawful" to the concept of unfair business practices. As Barquis v. Merchants Collection Assn., 7 Cal.3d 94, points out, the old common law concept of unfair business practices has been enlarged by the 1969 amendment for the protection of the public and now clearly includes unlawful activities. Since, as we shall see, defendants' business practices were clearly unlawful under Business & Professions Code § 2556, Civil Code § 3369 is applicable and plaintiffs have standing under that section to seek injunctive relief.

(2) That Business & Professions Code § 2556 is unconstitutionally vague. Not so.

Business & Professions Code § 2556 provides in substance that it is unlawful for an optician to advertise the furnishing of or to furnish the services of an optometrist or to directly or indirectly employ or maintain an optometrist on or near the premises used for optical dispensing.

The policy underlying such a law is clear. An optometrist is a professional man; his duty is to examine patients to determine whether or not they need glasses. If they do, he prescribes them. If not, he doesn't. The optician, on the other hand, is a business man. He sells glasses for a profit. The motives of the two are inconsistent. This section insures that the patient will have the undivided loyalty of his optometrist and not share that loyalty with an optician who is interested in selling glasses. Thus, as applied to the facts of this case, an optician who is giving fully-equipped premises to optometrists virtually rent free, and guaranteeing them up to \$30,000 per year, creates a situation in which the optometrist can hardly remain ignorant of the

fact that the reason he is receiving the money is to examine eyes and write prescriptions.

Defendants fault the statute for the use of the word "near" and conjure up horrible examples of how that word may be misconstrued. However, it is a basic of constitutional interpretation that one cannot attack a statute as unconstitutional on the ground that it might conceivably be administered against someone else in an unreasonable way.

There is manifestly nothing vague about "advertising," "furnishing," "employing," or "maintaining." (See Drucker v. State Board of Medical Examiners, 143 Cal. App.2d 702.) As to the word "near," it cannot be said that the word is so vague and ambiguous that the statute is unconstitutional. Certainly, it is not as exact as the word "on." However, most words have a certain flexibility in meaning. And here when the facts show clearly that the defendants maintained optometrists in partitioned off offices or immediately next door or contiguous to the offices of

opticians, then there can be no question but that the offices were "near" and came within the statute.

(3) That the intervenors have no standing. They have.

Defendants contend that since the plaintiff optometrists came in under Civil Code § 3369 for injunctive relief that the Board of Medical Examiners has now unlawfully "enlarged the action" by alleging that these acts constituted a violation of Business & Professions Code § 2556. Thus, they reason the intervenors have no standing. This contention lacks merit.

Plaintiffs' original action was to enjoin the defendants from committing unlawful acts. Civil Code § 3131 authorizes such an action. Additionally, that section authorizes the Attorney General or Board of Medical Examiners to effect the same injunctive relief. Section 2559 of the Business & Professions Code authorizes the Board of Medical Examiners to request injunctive relief against violations of Business & Professions Code § 2556. Thus, under the statute and under the principle

that intervention is proper to avoid multiplicity of lawsuits, the injunction was clearly proper. Actually, the defendants benefit from the intervention, otherwise, they would have to defend two lawsuits.

(4) That the defendants' actions did not violate Business & Professions Code § 2556. They did.

In this regard, defendants rely on Drucker, supra, which supports their position not in the least. In Drucker, the opticians made premises available to optometrists. In some cases rent was paid by the optometrists and in all cases the optometrists maintained their own equipment and retained the fees charged. The court found that this evidence did not support the charge that the opticians either furnished, employed or maintained the optometrists. Here, the optometrists were paid what amounted to a salary or retainer by way of a guarantee up to \$30,000 per year. They were furnished free fully-equipped offices. They were clearly subject to the optician's control as to the filing of business reports and the keeping of business hours. The words "furnish,"

"employ," and "maintain" are the key words in Business & Professions Code § 2556. Clearly the evidence supports the trial court's finding that the opticians furnished, employed and maintained the optometrists in this case.

Judgment affirmed.

/s/ Gardner
P.J.

We concur:

/s/ Tamura

/s/ McDaniel

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APPENDIX B

Business & Professions Code

Unlawful Acts

2556. It is unlawful to do any of the following: To advertise at a stipulated price or any variation of such a price or as being free, the furnishing of a lens, lenses, glasses or the frames and fittings thereof; to advertise any examination or treatment of the eyes in connection with the sale of eyeglasses, spectacles, or the parts thereof; to insert any statement in any advertising in connection with the business of dispensing optician which is false or tends to mislead the public; to make use of any advertising statement of a character tending to indicate to the public any superiority of any particular system or type of eyesight examination or treatment over that provided by other licensed ocular practitioners; to advertise the furnishing of, or to furnish the services of a refractionist, an optometrist, a physician and surgeon; to directly or indirectly employ or maintain on or near the premises used for optical dispensing, a refractionist, an optometrist, a physician and surgeon, or a practitioner of any other profession for the purpose of any examination or treatment of the eyes; or to duplicate or change lenses without a prescription or order from a person duly licensed to issue the same.

Penalty

2558. Any person who violates any of the provisions of this chapter is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not less than 10 days nor more than one year, or by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by both such fine and imprisonment.

Rules and Regulations

The Board of Medical Examiners may adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, such rules and regulations as are reasonably necessary to carry out the provisions of this chapter.

(Amendment by Stats. 1957, Ch. 2064.)



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